IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Second Appeal No.1257 of 2005

1. Sundarabai Tulashiram Dinde
andothers ..Appellants

vs.

1. Bhagwanta Namdeo Dhinde and ors. ..Respondents

Mr.Umesh Manakapure for appellants.
Mr.S.A.Rajeshirke for respondents nos.1a to 1j.

CORAM: S.C.DHARMADHIKARI J.
11th **July, 2007**

P.C.

1. Heard Shri Manakapure for appellants and Shri Rajeshirke for respondent nos. 1a to 1j.

2. Perused the judgments of the Trial Court and lower Appellate Court. The suit instituted by the appellants/original plaintiffs was dismissed in toto by the Trial Court but has been partly decreed by the lower Appellate Court by which the appellants are aggrieved and that is how the instant second appeal.

3. The substantial question of law, according to Shri Manakapure, is that the appellants/original plaintiffs have established that in sofar as Gat No.81/3 is concerned the same is purchased out of the joint family funds and nucleus is established. Therefore, there was no warrant

in not decreeing the suit in its entirety. If the common ancestor through whom both the appellants and original defendants are claiming has been residing with the appellants and the defendants so also they were jointly cultivating the land then it goes without saying that the appellants had upon establishment of the partial share becomes entitled to the share in rest of the properties of the deceased common ancestor. He submits that it is not necessary for the appellants/original plaintiffs to prove that the properties were acquired out of the joint family funds and, therefore, ancestral property once the above mentioned admitted factual position becomes clear on record.

3. This is not a case where the lower Appellate Court can be said to have committed an error in partially decreeing the suit. In para 10 of the impugned judgment and order after referring to the admitted facts in the preceding para, the learned Judge has referred to two other properties survey No.102/2C and survey no.43/1. The sale deeds are in the name of the original defendants. The sale deed is referred in the mutation entry. According to the learned Judge Exh.35 is the sale deed with regard to survey no.43/1. The learned Judge has rightly observed that ultimately it is a question of fact as to how the property becomes the joint family property. If the property is purchased of the joint family nucleus,

according to the learned Judge, it would be joint family property. The plaintiff approached the Court seeking partition of ancestral property but pleadings are silent with regard to the fact that the property has been purchased out of joint family funds or nucleus, in the name of the defendant who is the Manager. Hence, if the case of the appellant before the Court is that the properties are ancestral properties, then, he is duty bound to prove it.

4. In the instant case, the Court below has rightly observed that except Survey No.81/3 and to the extent of half share therein, there is no pleading that the properties acquired out of joint family funds are, therefore, joint family properties. It is only pleaded, according to the learned Judge in para 2, that the lands are ancestral. That being the position, and considering the plea raised, entire material on record has been considered by the lower Appellate Court. It has duly performed its duty in law and partly decreed the suit. Once the material with regard to other lands was lacking there is no error committed by the learned Judge in decreeing the suit partly. In such circumstances, in my view, no question of law much less substantial question of law would arise in the present case. The learned Judge has by balancing the rights of the parties to the suit and partly decreeing the suit granted shares to both the

appellants before me and the respondent to the extent indicated at pages 24/25. I see no reason to interfere with this judgment of the lower Appellate Court in my jurisdiction under section 100 of the Code of Civil Procedure. Second appeal is accordingly dismissed.

(S.C.DHARMADHIKARI J.)